SUPREME COURT OF QUEENSLAND

CITATION:	*R v Omid* [2012] QCA 4
PARTIES:	**R** **v** **OMID, Arnesa** (appellant)
FILE NO/S:	CA No 180 of 2011 DC No 173 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore on 29 November 2011 Reasons delivered on 3 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2011
JUDGES:	Margaret McMurdo P, Fraser JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 29 November 2011:** **1. Appeal against conviction allowed.** **2. Convictions are set aside.** **3. A new trial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant was convicted of arson and attempted aggravated fraud of his insurer – where the appellant's counsel at trial told him on numerous occasions that the prosecution case was not strong and he was likely to be acquitted even without an expert report gainsaying the expert opinions of prosecution witnesses as to the cause of the fire – where the appellant on appeal adduced an expert report disputing the prosecution expert evidence – where the appellant contended that had his lawyers at trial advised him to obtain an expert report and to call an expert witness he would have done so – whether the decision not to obtain an expert report was an informed decision made on the basis of competent legal advice – whether there has been a miscarriage of justice arising from the incompetent conduct of the appellant's legal representatives at trial CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL –

IRREGULARITIES IN RELATION TO JURY – PARTIALITY – where a juror claimed to be psychic and communicated her abilities to the speaker of the jury – where the trial judge discharged the juror because of the risk that she may be influenced by what she apprehended as another power instead of solely by the evidence before the court – where the trial judge found there was no evidence that any juror apart from the speaker had been told of her psychic powers or her conclusion about the case based on those powers – where the trial judge determined that there was no risk that the balance of the jury could not return a verdict according to the evidence – whether the trial judge erred in failing to discharge the whole of the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL ALLOWED – where the appellant argued that the trial judge erred in directing the jury that the appellant's account was a lie demonstrating a consciousness of guilt – where the appellant on appeal adduced an expert report supporting the appellant's account as to the cause of the fire and gainsaying the prosecution expert evidence – where the appeal was allowed – whether in the event of any re-trial this direction would be required

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
R v Birks (1990) 19 NSWLR 677, cited
R v Sheppard [2005] QCA 235, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, cited

COUNSEL: P E Smith, with K M Hillard, for the appellant
B J Power for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Arnesa Omid, was convicted after a five day jury trial on 3 June 2011 of arson of his house at 85 Kerry Road, Archerfield on 16 January 2009 and attempted aggravated fraud of his insurer. On 22 June 2011, he was sentenced to four and a half years imprisonment for the arson and two years imprisonment for the attempted aggravated fraud. He appealed against his convictions on the grounds that his lawyers' conduct of his trial occasioned a miscarriage of justice; the trial judge erred in directing the jury as to lies; and the trial judge erred in failing to discharge the whole jury after discharging a jury member who claimed to be psychic. He also adduced evidence in the appeal in support of the first of these grounds. The respondent adduced evidence in

response. The appellant's application for leave to appeal against sentence was dismissed with his consent at the commencement of the appeal hearing on 29 November 2011. At the conclusion of the appeal hearing, the Court allowed the appeal against conviction, set aside the convictions, ordered a new trial and reserved its reasons for those orders. What follows are my reasons for joining in those orders.

[2] Before returning to discuss the grounds of appeal, it is necessary to summarise the evidence at and the course of the trial.

The evidence at trial

[3] The prosecution case was circumstantial. It was that the appellant purchased a lawn mower, a petrol tin, a spray container and petrol a few days before the fire and used the petrol to deliberately set fire to his house shortly before 8.00 am on 16 January 2009. The prosecution contended that the appellant had a motive to set fire to the house, namely, to make a claim on his insurance policy or perhaps to sell the land for industrial purposes. The prosecution contended that the appellant lied about the fire seeming to be mainly in the kitchen and that he lied out of a consciousness of guilt. The expert evidence showed that the fire could not have started in the kitchen and was caused by igniting petrol in the lounge room. Petrol or turpentine was found on the shorts he was wearing when he jumped out the window.

[4] The evidence at trial included the following. The Queensland Fire and Rescue Service (QFRS) received a call at 7.55 am and arrived at the scene at 8.03 am, by which time the fire was very well developed. They had it under control by 8.11 am but did not extinguish it until 8.27 am.

[5] A neighbour saw the appellant jump from a rear window of the house at about 8.00 am. His t-shirt was inside out and his hair and body were wet. The neighbour asked the appellant if there was anything flammable in the house and they both went around the back and hosed the underside of the house and paint tins stacked there.

[6] Murray Nystrom, whose expertise as a fire investigator was unchallenged by defence counsel, noted a mark on the bathroom window which showed that somebody had recently climbed out of it.

[7] The appellant told fire officers at the scene and investigators subsequently that he put bread in the toaster before showering; he then heard or smelled something. He got out of the shower to discover the fire. He unsuccessfully tried to extinguish a burning chair in the lounge room area near the kitchen with a rug. He was taken to hospital and treated for a second degree burn to his hand.

[8] Craig George, a fire investigation officer from QFRS; Mr Nystrom; and police scientific officer, Andrew Rowan, all formed the opinion that the fire was started when an accelerant was poured on the lounge room floor and ignited. This opinion was based on the extensive damage to the timber flooring in the lounge room; the distance from this area to any electrical appliances; the fact that the lounge room floor boards were burned through; and the pattern of the burns. There was fire damage in the kitchen but it was not extensive enough for the fire to have originated there. The fire progressed from the lounge dining area and hallway into the kitchen. The toaster safety switch was in the off position but it was not possible to say whether it had earthed out. There was no evidence of fire starting within the kitchen appliances or that fire spread from them.

[9] Mr Nystrom considered that between one and 10 litres of petrol was used to ignite the fire. Petrol used to clean floors could evaporate and explode but he found no signs of a detonation of vapour. He conceded that when flammable liquids are heated they explode. In such circumstances, glass shards could be sprayed 10 to 20 metres from the windows but there were no signs of such a vapour explosion in this case. For the appellant to have seen the kitchen on fire and tried to extinguish the fire as he described, he would have had to run through burning petrol and would likely have caught fire. The toaster was not the cause of the fire as the oxidation on it showed that fire had travelled towards it, not out of it.

[10] Mr George considered that the fact the bread in the toaster was not charred all the way through was inconsistent with the fire originating in the toaster.

[11] Samples taken from the lounge room floor and skirting boards tested positive for aromatics, including petrol, and most samples tested positive for petrol. A sample from a skirting board near the kitchen tested positive for petrol. A sample from the appellant's shorts which he was wearing when he jumped out of the window tested positive for petrol, turpentine or a petrol-based product. No swabs were taken from the appellant's hands. The police investigators noticed that a bed in the main bedroom looked as if someone had just got out of it. There was a phone, wallet, jeans and keys in the room. The appellant's metal tool boxes were under the house as was a small outboard motor.

[12] Closed circuit television footage (CCTV) showed the appellant buying petrol two days before the fire. The receipts for a lawn mower, petrol tin, petrol and a pressurised spray bottle were readily located in his car. The lawn mower, petrol tin and spray container were not located at the house.

[13] The appellant took part in an interview with police on 16 January 2009; signed a statement to police on 21 January 2009; and was again interviewed by police on 24 April 2009. On 20 January 2009, he gave an interview to an investigator on behalf of his insurers. Throughout all these interviews, he maintained that on the morning of the fire he put bread in the toaster and then had a shower. Whilst in the shower, he heard loud noises and bangs and smelled smoke. He investigated and found fire and black smoke coming from the kitchen area with a chair near the kitchen alight; there was also fire in the lounge room area. He tried to extinguish the fire with a rug. He was unable to get to the back door which was locked. He put on some dirty clothes from the bathroom and jumped out the window. He believed the fire had started in the toaster in the kitchen. He had been renovating the house because of damage done by a tenant who had been evicted. Prior to that tenant moving in, he had extensively renovated the house. Before the fire, he was painting with turpentine-based paint. He had also sanded and relacquered the floor.

[14] The record of the appellant's interview with police on the day of the fire was not led at trial. The appellant's statement to police on 21 January[1] and a recording of his interview with police on 24 April[2] were tendered. The recording of the appellant's interview with an insurance investigator was also tendered.[3] A newspaper article of 28 March 2009[4] was tendered without objection through the insurance investigator,

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1 Exhibit 11.
2 Exhibit 12.
3 Exhibit 1.
4 Exhibit 2.

despite the judge querying its relevance. The article, which post-dated the fire, referred to controversy in the Archerfield area about industrial development on residential land.

[15] In the interview of 24 April 2009, the appellant told police that the lawn mower was at his estranged wife's house but there was no evidence as to whether police made any enquiries about the lawn mower.

[16] The appellant, through his counsel, made the following admissions. In January 2009 he had an insurance policy for the house the subject of the charge of arson for $185,000 (structure) and $40,000 (contents). One of the risks insured against was fire. He lodged a claim with his insurer at 4.50 pm on 16 January 2009, alleging the structure and contents had been damaged by fire and asserting that he did not start and was not involved in starting the fire. Had he been responsible, he would not be entitled to claim against his insurer. At about 7.50 am on Friday, 16 January 2009, the fire started within the dwelling when he was the only person present inside the house or on the property. When he left the immediate vicinity of the fire, he was wearing a shirt and a pair of shorts which were taken by police for analysis. There was no tampering with or contamination of the clothes during the analysis. On Wednesday, 14 January 2009, he purchased a drink and 5.01 litres of unleaded petrol from a service station at Rocklea and poured the petrol from the bowser into a container. CCTV of that process and still images taken from the footage were admitted by consent.

[17] The appellant did not give or call evidence. The defence case was that the appellant had no motive to burn down his own house. His income exceeded his expenditure and the house was paid off. The jury would be left in doubt as to his guilt.

The psychic juror

[18] On the fourth day of the trial, the judge told counsel in the absence of the jury that a matter had arisen with respect to a juror and that he would speak to her in open court. The bailiff brought the juror into court and the judge asked her what was the issue. She responded:

> "There's no issue. I just thought that yourself needed to know.
> HIS HONOUR: Yes.
> JUROR NO.11: I actually do this, and I do see.
> HIS HONOUR: Yes.
> JUROR NO.11: I saw from the beginning when I sat there.
> HIS HONOUR: What I've been told is that you have some sort of a practice as a psychic; is that right?
> JUROR NO.11: A medium.
> HIS HONOUR: As a medium?
> JUROR NO.11: Hm-mmm.
> HIS HONOUR: Right. And that you've been taking a lot of notes?
> JUROR NO. 11: Hm-mmm.
> HIS HONOUR: But - now tell me as if I don't know anything else, tell me what's going on. I mean-----
> JUROR NO.11: I'm sorry in which way? I don't understand what you mean.
> HIS HONOUR: What's the issue you raised this morning with the Bailiff? Tell me what you told the Bailiff.

JUROR NO.11: I told him that I spoke to the speaker and he suggested - because I let the speaker know what I do.
HIS HONOUR: Right.
JUROR NO.11: And he suggested that I speak to the Bailiff, who will speak to you in turn-----
HIS HONOUR: Right. Okay.
JUROR NO.11: -----and we'll leave it at that.
HIS HONOUR: All right.
JUROR NO. 11: That's what he said, 'We'll see what happens from there.
HIS HONOUR: So that's all you've told the speaker?
JUROR NO.11: Yes.
HIS HONOUR: But what I understand is that you've been taking a lot of notes, but - I guess the question is this: the duty of the juror is to return a verdict according to the evidence. Do you see that that's a problem?
JUROR NO.11: No. I've actually been doing this, the jury duty, as a normal person, not with my gift.
HIS HONOUR: Right. But have you, apart from the evidence, reached a view from something you've - some other perception about what has happened in this case?
JUROR NO.11: I haven't reached a conclusion for myself, personally, because I'm going through the motions as a juror and writing down all the necessary points that need to be written down and discussing.
HIS HONOUR: Yes. So, you haven't come to a view about what's happened except for-----
JUROR NO.11: I did see in the beginning-----
HIS HONOUR: -----what the evidence has told you? Oh, you did see in the beginning?
JUROR NO.11: I did see in the beginning, yes.
HIS HONOUR: What do you mean by that? I don't need you to tell me what you saw, but what I need to know, I suppose, is this: if-----
JUROR NO.11: I'm not sure how to explain it.
HIS HONOUR: Have a go.
JUROR NO.11: I saw the outcome in the beginning.
HIS HONOUR: When you say you saw the outcome, do you mean you saw the verdict, the decision of the jury, or-----
JUROR NO.11: No.
HIS HONOUR: -----or do you mean that you can-----
JUROR NO. 11: No, no, no, no.
HIS HONOUR: -----you understand what happened with respect to the fire?
JUROR NO. 11: Yes, that would be a better way to put it.
HIS HONOUR: Right. Well, what concerns me is whether the decision that you would make as a juror is influenced by anything other than the evidence.
JUROR NO.11: No.
HIS HONOUR: What about - what about if at the end of all of the evidence you form a view that even though the evidence doesn't

> support it, what you understood from the start of the trial is what happened, what are you going to do then?
> JUROR NO.11: I am functioning as a juror, as a normal person, not as a medium in this trial.
> HIS HONOUR: Right.
> JUROR NO.11: Sometimes this can be a real big burden.
> HIS HONOUR: Hm-mmm.
> JUROR NO. 11: But I do prefer to be honest with it.
> HIS HONOUR: And that's good. So when you said to me a minute ago that you understood - tell me if I get this right, feel free to correct me about this, okay. You understood at the start of the trial what had happened-----
> JUROR NO.11: Yes.
> HIS HONOUR: -----is that right?
> JUROR NO.11: Yes.
> HIS HONOUR: Have you told that to the speaker?
> JUROR NO.11: No.
> HIS HONOUR: Right. So, what you said before was that all you've told the speaker is that you are, or that you have-----
> JUROR NO.11: That I'm a psychic.
> HIS HONOUR: That you're a psychic.
> JUROR NO. 11: A medium.
> HIS HONOUR: You haven't told the speaker that you've already understood what's happened in this case?
> JUROR NO.11: No.
> HIS HONOUR: And you haven't told him what that is?
> JUROR NO.11: No."

[19] The judge sent juror number 11 out of the courtroom but away from other jury members. Defence counsel submitted that the trial had been "contaminated"; juror number 11 had communicated with the speaker and "contaminated" him and it was impossible to know the position in relation to the other jury members.

[20] The judge had the speaker brought into court. The speaker told the judge that juror number 11 asked him if she should speak to the judge about her "internal… abilities" and whether she was able to stay on the jury. The speaker told her that she should inform the judge. He first found out about her claim to be a psychic the previous day. The following exchange then occurred:

> HIS HONOUR: Did she tell you anything about any view she might have about the case? I mean-----
> SPEAKER: We've been talking about it in the jury room just now.
> HIS HONOUR: Yes.
> SPEAKER: Different people have heard different things but not everyone has been on the same wavelength and heard everything simultaneously.
> HIS HONOUR: From her?
> SPEAKER: Yeah. But none of us feel like we've been tainted or bias or anything by anything that she said. Most of us are-----
> …
> SPEAKER: In fact, something - she made a comment on Tuesday saying, 'You know, I believe this', and I - I intervened and said, 'It's

> not our place to try and work out why and all that sort of stuff. We may not know, so we don't talk about that, let's stick to the facts.'
> HIS HONOUR: Yes. All right.
> SPEAKER: And she's been good since that in the jury room, *but privately - like in group situations, but she's been possibly talking to people privately*.
> HIS HONOUR: Right.
> SPEAKER: But no-one has been - we're all, you know, quite okay.
> HIS HONOUR: Yes, yes. All right. Well, look, thanks. Well, would you now go back to the jury room but keep to yourself-----
> SPEAKER: Don't say anything.
> HIS HONOUR: -----our discussion.
> SPEAKER: Okay." (my emphasis)

[21] The speaker left the courtroom. Defence counsel urged the judge to discharge the jury or to make further enquiries of the other jury members. His Honour determined to discharge juror number 11 because of the risk that she may be influenced by what she apprehended as another power instead of solely by the evidence before the court. The judge found there was no evidence that any juror apart from the speaker had been told of her psychic powers or her conclusion about the case based on those powers. There was no risk that the balance of the jury could not return a verdict according to the evidence. The judge then discharged juror number 11. When the balance of the jury returned to the courtroom, the judge stated:

> "HIS HONOUR: Members of the jury, you'll notice that juror 11 isn't here anymore. An issue arose with respect to juror number 11 and it was brought to my attention, and after a lot of consideration and discussion, and hearing submissions from counsel, I've decided that the best way to proceed is to excuse juror number 11 from further participation in the trial. It doesn't need to concern you why that happened, but you're entitled to carry on now as a jury of 11."

Relevant aspects of the judge's directions to the jury

[22] The judge gave the following directions to the jury, consistent with *Edwards v The Queen*,[5] as to the prosecution's contention that the appellant lied about what he saw of the fire out of a consciousness of guilt:

> "Also the prosecution relies on what it says is a lie told by the [appellant] as showing that he is guilty of the offence.
>
> You recently heard submissions from [the prosecutor] about this, as I understand it, and I will cover this again when I am reviewing the arguments by both sides soon, it is said that part of the account given by the [appellant] to all of those who investigated the fire is a lie; that part where he says he comes out of the bathroom and sees what he says he sees, that is a fire in the kitchen, the chair against the wall near the kitchen alight, and the account he gives of his movements and the prosecution argument is, as I perceive it, that if you properly understand the expert evidence about the start of the fire and the progress of the fire, then what the [appellant] says about what he saw must be wrong and that that must be a lie, and that that is a lie which demonstrates he is aware of his guilt.

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5 (1993) 178 CLR 193; [1993] HCA 63.

So that's what we are talking about, a lie. Before you can use this evidence against the [appellant] you must be satisfied of a number of matters. Unless you are satisfied of all these matters you cannot use the evidence against the [appellant]. First you must be satisfied that the [appellant] has told a deliberate untruth. There is a difference between the mere rejection of a person's account of events and finding that the person has lied. In many cases where there appears to be a departure from the truth it may not be possible to say that a deliberate lie has been told. The [appellant] may have been confused or there may be other reasons which would prevent you from finding that he's deliberately told an untruth. So the first point is you must be satisfied that, indeed, he has deliberately told a lie, and as I said, it seems to me that before you could be satisfied that his account of his movements is a lie, you would have to conclude that the evidence of the experts as to the progress of the fire was, indeed, inconsistent with what the [appellant] said he did because, of course, if you are not really satisfied that the fire progressed in a way that makes his account unlikely or plainly wrong, then you would have trouble being satisfied that he's told a deliberate lie, so what I am doing now is giving you some directions about how you may approach, you must approach this issue of whether there has been a lie.

The first point is you must be satisfied that he's told a deliberate untruth. I am moving to the second point which is you must be satisfied that the lie's concerned with some circumstance or event connected with the offence. This is less controversial. You can only use a lie against the [appellant] if you are satisfied having regard to the circumstances connected with the offence that it reveals a knowledge of the offence or some aspect of it, and in that regard, the statement of his movements is directly connected with the progress of the fire. Third, you must be satisfied that the lie was told because the [appellant] knew that the truth of the matter would implicate him in the commission of the offence. The [appellant] must be lying because he is conscious that the truth could convict him. So you must take into account that, or you must ask yourself whether there are reasons for a lie if this is a lie, apart from a realisation of guilt. People sometimes have an innocent explanation for a lie. If such a reason is explanation for the lie then you can't use it against the [appellant], you can only use it against the [appellant] if you are satisfied that he lied out of a realisation that the truth would implicate him in the offence. So those are my directions about that, members of the jury.

As I understand it, the prosecution case being put to you is a circumstantial one - that you may draw beyond reasonable doubt the inference of guilt from the circumstances. The prosecution also relies on what it says is a lie demonstrating guilt, and I've given you some directions now about how you must approach that. You can only use that as part of a process towards a conclusion of guilt if you are satisfied that, indeed, there was a deliberate untruth; that it was concerned with the circumstances of the offence, and that the [appellant] told the lie because he knew that the truth would implicate him – those three things."

[23] The judge then summarised counsel's competing cases. The prosecution case was that from the many pieces of circumstantial evidence the jury would find beyond reasonable doubt that the appellant started the fire. The appellant had broken up with his wife; he purchased petrol two days earlier; he bought the mower to make the purchase of petrol seem innocent; he transferred the petrol to a plastic sprayer; he left the receipts in his car as a cover; his tools were in a locked demountable and his business records were safe. The jury would be satisfied that he poured or sprayed petrol around the house. The plastic spray bottle was consumed in the fire. He planned to leave by the front door but was foiled by the heat of the fire and had to urgently exit through the bathroom window. Once outside, he knew he was being observed and so took measures to extinguish the fire. At first, he told investigators the toaster theory and only later when he realised that was not going to succeed did he come up with others. He said he had been living in the house for seven months but there were very few items of clothing there. His laptop was in the car and there was no risk to his business from the fire. The furniture in the house was cheap; there were no tools under the house; and the mower was gone. He took photographs of parts of the house before the fire. There was a motive. Expensive kitchen renovations had not been undertaken. There was interest in this house or houses in this area for industrial use. The expert evidence was compelling that the fire was deliberately lit after petrol was poured onto the lounge room floor which was the seat of the fire. The appellant's account, that he came out of the shower, went to the lounge, saw the kitchen on fire, saw the chair alight and tried to extinguish it with a rug, was a lie. He told this lie because he knew the truth would implicate him in lighting the fire. The jury would be satisfied beyond reasonable doubt that the appellant lit the fire and made the insurance claim knowing that he lit the fire.

[24] The defence case was that the appellant did not light the fire. Defence counsel did not dispute that the fire was probably started in the lounge room as a result of igniting petrol so that it did not seem there was much dispute about the expert evidence. But the defence case was that the appellant did not cause the fire. He was not in debt. Over the last two years, his income exceeded expenditure and he was in a comfortable financial position so there was no motive for him to burn the house. The separation from his wife was irrelevant. He told police that their relationship was reasonable and he had a room at her house where he stayed when he visited their daughter. The appellant would not have burned down his house at a time when the road was busy. Nor would he have bought petrol at a petrol station only a mile or two away if he were planning to burn it down and defraud his insurer. The presence of the receipts in his car was not consistent with guilt. Why would he burn down the house where he lived and where his business records were kept? The jury would be satisfied that he was not lying to investigators. Other factors were consistent with the appellant's account. His hair was wet when he left the house consistent with him just having had a shower. There was other evidence consistent with him jumping out the bathroom window. He was seen to be in a state of shock, consistent with someone whose house had suddenly burned down. He cooperated with the investigators. There was nothing suspicious about him contacting his insurer on the day of the fire. Defence counsel urged the jury to listen to the recorded interviews with the appellant and make up their own minds. Counsel submitted that the jury would at least have a doubt about the appellant's guilt on both charges and acquit him.

Did the conduct of the appellant's lawyers at trial cause a miscarriage of justice

The further evidence adduced in the appeal

[25] The appellant adduced evidence in the appeal in support of his contention that his lawyers conducted the trial incompetently, causing a miscarriage of justice. This included affidavits from the appellant and from his current instructing solicitor, Mr Fisher, exhibiting the evidence handed up at and the transcript of the committal proceedings; the transcripts of the interviews between the appellant and police on 16 January and 24 April 2009; and a report from Anthony Cafe, a chartered chemist and consultant in T C Forensic Pty Limited.

The new forensic expert report

[26] Mr Cafe, whose qualifications were unchallenged by the respondent, stated the following. There was credible evidence that the fire started from the toaster. There was no credible evidence of arson. The finding of petrol in some samples of skirting board was probably solvents from floor varnish. The burn patterns on the lounge room floor were typical burn patterns sustained when a floor burns through after a flash over. The finding of turpentine or petrol on the appellant's clothing was consistent with him making contact with these materials on the days before the fire during lawful activities. The investigators used the burn patterns in the lounge room to predict how the fire initially spread. But this was a severe and extensive fire and these burn patterns would have been made late in the fire, not at its initiation. The opinions of the fire investigators at trial that the fire started in the lounge room at the centre of the house are not supported by eye witness observations that the fire appeared to be spreading from the left side of the house where the kitchen was situated.

[27] Counsel for the respondent, Mr Power, conceded that Mr Cafe's report was capable of amounting to credible evidence disputing the prosecution evidence as to the cause of the fire. If received into evidence by this Court, it would require a jury to determine whether the prosecution had proved the cause of the fire beyond reasonable doubt. But the issue for this Court, Mr Power contended, was whether the incompetency of the appellant's trial lawyers had caused a miscarriage of justice. Mr Power read affidavit evidence in response from the appellant's trial counsel and instructing solicitor. Oral evidence and cross-examination at the appeal hearing was limited to that of the appellant and his solicitor and barrister at trial.

The appellant's evidence

[28] The appellant deposed to the following. A few days after he was charged in late April 2009, he found "Bartels Solicitors" in the Yellow Pages, telephoned and asked for assistance with his case. He was put through to Mr Tom Williamson (a barrister). Mr Williamson made an appointment and quoted a fee of $1,000. The appellant kept the appointment a few days later at Bartels Solicitors' offices at Mt Gravatt. In all, he recalled paying between $20,000 and $25,000 to either Bartels Solicitors or Mr Williamson for the trial and committal hearing. He could not be more precise as he was sometimes asked to pay cash. He was always given receipts. He had located receipts for $18,000 but he thought he had paid several thousand dollars more.

[29] At one meeting Mr Williamson advised him he needed his own expert witness as to the cause of the fire and he agreed. He was happy to pay for an independent expert

and left it to Mr Williamson to organise. To the best of his recollection, Mr Williamson did not raise the matter of an expert witness again. At no stage did the appellant instruct Mr Williamson not to obtain an expert report. As the matter was not discussed further, the appellant assumed Mr Williamson would have obtained an expert report if necessary. Mr Williamson kept telling him he had a good chance of winning.

[30] He always consulted Mr Williamson in Bartels Solicitors' offices at Mt Gravatt. At all meetings prior to the committal hearing, Mr Williamson was alone; no solicitor was present. Before the committal hearing, he told Mr Williamson about the problems caused by the previous tenants. They were "bikies" and he had them "kicked out". He also told the police and the insurance investigator about these tenants.

[31] Mr Williamson quoted $10,000 to $15,000 for the committal and trial. He said the appellant had a really good chance of winning the case; he had done lots of cases like this before and had a very good record. No solicitor was present at the committal hearing. Mr Williamson told him that the police had obtained the appellant's financial records. He explained that this evidence assisted him. It showed he was neither in debt nor having financial difficulties; the house was paid off and there was no reason for him to burn it down.

[32] At another appointment, Mr Williamson explained that the fire investigation report stated the fire was deliberately lit with petrol. He told Mr Williamson that he had not deliberately lit the fire. He explained that he had recently renovated the house using polyurethane to stain the floors and turpentine to clean the floors beforehand and to thin the polyurethane.

[33] He first met the solicitor, Ian Bartels, after the committal hearing for about 10 to 15 minutes. He came into the room during a conference with Mr Williamson. Mr Bartels did not seem to know much about the case but he said it was a serious charge and defending it would cost more than initially discussed; considering the number of witnesses it could be a three to five day trial and would cost an additional $10,000 to $15,000.

[34] During the conferences Mr Williamson did not take notes or record conversations. At no time did the appellant sign any instructions about whether he would plead guilty or not guilty. He did not sign any statement about the facts surrounding the fire or about his personal or family history. On the second day of the trial he was concerned that Mr Williamson was not saying much in court and asked him why. He said the trial was going in the appellant's favour and the less said the better. The appellant suggested that he could clarify what happened and could answer any questions. Mr Williamson said, "Sometimes they ask confusing questions. It's going well for you. You don't want to go in and fuck it up." No instructing solicitor was present during the trial apart from once on the third or fourth day when Mr Bartels came into court just before the luncheon adjournment. He sat beside Mr Williamson for less than 15 minutes. He gave the appellant the "thumbs up" which the appellant understood to mean that everything was OK. The appellant did not see Mr Bartels again.

[35] He did not consent to the tender of a newspaper article.[6] Mr Williamson told him "It's nothing against you. It's about the commercial interest on properties in the

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[6] Exhibit 2.

Archerfield areas but doesn't concern you and it doesn't affect this." Had he been informed of the contents of the newspaper article, he could have explained that the article did not provide or support any motive for the appellant to burn down his house.

[36] He believed that if his insurers met his claim, he would receive money to pay builders to construct a new house or to rebuild the existing house. He did not believe he would get a cash payout. He always intended to rebuild the house and he subsequently demolished it and rebuilt a new house.

The solicitor's evidence

[37] Mr Bartels gave the following evidence. The appellant retained his firm to act in relation to the charges. He has been in practice as a solicitor since 1989 and as a sole practitioner since 1994. His practice is primarily conveyancing and family law, with some criminal matters (usually minor). He has known Mr Williamson since they were law students. Intermittently, he has retained him as counsel for clients in criminal matters, primarily in minor matters in local courts. Mr Williamson did not keep chambers or employ a secretary. Their arrangement was that Mr Williamson attended at Mr Bartel's offices for client conferences which were conducted in the boardroom. Until recently, he believed this arrangement was beneficial to clients as Mr Williamson's fees were substantially less than other barristers' and it enabled clients to confer locally instead of travelling into the city. Over the last 12 months, Mr Williamson has suffered from health issues (diabetes). Mr Bartels has now decided that, consistent with his duty to his clients, he can no longer retain him until these health issues are resolved.

[38] If the appellant was put through to Mr Williamson when he telephoned Mr Bartel's firm, Mr Williamson must have been in the office in relation to another matter. Mr Bartels acknowledged that his involvement in the appellant's case was "not ideal" and that he did not devote the time to it which would ordinarily be expected. His practice was extremely busy at that time. Further, the appellant's financial resources were very limited and he was unable to fund legal representation at an ideal level. He advised the appellant that a four day trial inclusive of counsel's fees would cost $10,000. The appellant said he could only pay $5,000. Mr Bartels agreed to limit the trial fees, including counsel's fees, to $5,000. He left most of the work to Mr Williamson and had limited contact with the appellant. He sat in on conferences on two or three occasions but only for short periods. He attended court on one occasion but otherwise did not instruct Mr Williamson during the trial. He did not inform the appellant in advance of the trial that he would not be attending throughout. The appellant made no complaint about this and Mr Bartels assumed that he understood that he could not expect both counsel and solicitor to attend a four day trial for a total fee of $5,000.

[39] He recalled once discussing with the appellant in the presence of Mr Williamson the question of obtaining a defence expert report. He thought that this discussion took place during March 2011. He did not have a file note of the conference but he discussed the matter with Mr Williamson who said that he believed it was in about March 2011. He was asked when he discussed the conference date with Mr Williamson. He replied that he had obtained the date from Mr Williamson's affidavit prepared for this appeal which he read before he prepared his own affidavit. He added that Mr Williamson stated that it occurred in March 2011 but Mr Bartels was not sure of the date; it was around March 2011, about six months before the trial. Mr Williamson told the appellant that an expert report as to the

cause of the fire would cost between $2,000 and $5,000. The appellant stated he would not pay that. Mr Williamson told him that in those circumstances if the appellant wished to take the matter further he would have to make his own arrangements to obtain an expert report. Mr Bartels did not obtain a quote as to the cost of an expert report as he considered there was no point. Mr Williamson's advice as to the cost was conservative; there was no prospect of obtaining a report for less. At no time, including when he spoke to the appellant at court during the trial, did the appellant complain that no expert report had been obtained.

[40] The appellant paid various amounts in legal fees between 7 May 2009 and 20 May 2011 totalling $18,000. He could not exclude the possibility that additional payments were made to Mr Williamson.

[41] Mr Williamson told the appellant he had a good chance of winning his case. Mr Bartels had read the forensic evidence prior to trial; it appeared to be strong, but he was no expert and did not know. There were no signed instructions from the appellant about whether he would plead guilty or not guilty; whether he would give or call evidence; or whether he wanted or did not want an expert report. The appellant gave instructions on the police summary (form QP9) provided before the committal. Mr Bartels did not make many file notes in this matter because Mr Williamson mostly saw the client alone in the boardroom.

[42] In the week before the appeal hearing he wrote to the appellant's present instructing solicitor refunding $5,000 of the appellant's fees because he did not feel justified in charging what he did "bearing in mind the situation the [appellant was] in at the moment".

Trial counsel's evidence

[43] Mr Williamson's evidence included the following. He had been working as a barrister from his home since 1997 and regularly had conferences with clients in Mr Bartels' boardroom. He conferred with the appellant there. On a number of occasions, the appellant said he wanted a report in relation to the cause of the fire to support his version that it started in the kitchen. When they discussed the matter, he was vague as to what he wanted. At an early conference, Mr Williamson told him an expert report was necessary. In about March 2011 (he was unsure of the date) in a conference between the appellant, Mr Bartels and Mr Williamson, the appellant refused to fund a report when advised that it would cost between $2,000 and $5,000. The appellant wanted to demolish the burned out house which would have made it difficult to obtain a report. He subsequently demolished the house so that no testing could be done on timber or other items. He clearly remembered advising the appellant "that if he didn't wish to pay for a report then he would have to look into obtaining a report himself". At no time did the appellant provide funds for an expert report or give instructions to obtain one. In Mr Williamson's opinion "because of the Crown forensic evidence in relation to the fire, a report may well have been detrimental to his case". At numerous conferences before trial, he went through the prosecution case with the appellant, focussing on the forensic evidence. There were no file notes of these discussions. Despite the forensic evidence, he told the appellant he would win.

[44] Prior to and at the committal proceedings after considering the prosecution expert evidence, Mr Williamson formed the opinion that these experts "were quite strong witnesses about this being a deliberate fire with petrol". He could not remember ever telling the appellant that it may be necessary to revisit his decision about not getting his own expert witness to contradict the prosecution expert witnesses.

[45] At no time during the trial did the appellant complain about Mr Williamson's representation; he was always "quite happy". It was often difficult to obtain instructions from the appellant, in particular about previous insurance claims he had made. The appellant had always told him that he had not lodged any previous insurance claims. On about the third day of the trial, the prosecution advised him that the appellant had made previous claims in New South Wales.

[46] He had numerous conversations with the appellant prior to and during the trial as to whether he should give evidence. Mr Williamson formed the opinion he did not need to give evidence as his record of interview was the same as his instructions. If he gave evidence, he may have been cross-examined about why he did not tell the police about previous insurance claims or ex-tenants who could have caused the fire.

[47] Mr Williamson made an admission on the appellant's behalf that the appellant was the only person present in the house at the time of the fire. He made that admission on the appellant's oral instructions obtained during the trial and even though the appellant had told him that ex-tenants may have caused the fire. The appellant had instructed him that Ray White Real Estate agency took his ex-tenants to a tribunal. He did not think this line of enquiry would be fruitful because there was evidence that the doors and windows to the house were locked and the appellant had to jump out a bathroom window. There was no way another person could have entered the house, lit the fire and then left. There was no evidence to support the hypothesis that someone else may have lit the fire.

[48] Mr Williamson had suffered from diabetes for some years. This did not affect his conduct of the trial other than necessitating an adjournment of the sentencing proceeding. He thought the trial was going very well for the appellant at all times and he apprehended that the appellant would be acquitted. He told the appellant he would win his trial (or words to that effect) a number of times. As there was no financial reason for the appellant to burn down his house, Mr Williamson considered that the prosecution case was not strong, in spite of the forensic evidence. He was surprised at the jury verdict. At numerous conferences before trial he discussed the prosecution case with the appellant, focussing on the forensic evidence. Despite the forensic evidence, he told the appellant he would win. He kept no file notes of these discussions. In his experience, it was best not to take too many instructions from clients.

[49] During the trial, he discussed with the appellant the prosecution's application to tender the newspaper article.[7] The appellant did not say he did not want it tendered. Mr Williamson did not think it was significant and allowed it to be tendered.

[50] Mr Williamson did not know whether the appellant's insurance policy was for a cash payout or reinstatement; he did not think this was an important issue concerning motive.

Conclusion as to whether the appellant's legal representation at trial caused a miscarriage of justice

[51] It is not necessary in this case to resolve the inconsistencies between the evidence of the appellant, Mr Williamson and Mr Bartels. It is uncontentious that

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7 Exhibit 2.

Mr Williamson told the appellant on many occasions that the prosecution case was not strong and that he was likely to be acquitted, even without an expert report gainsaying the expert opinions of the prosecution witnesses. As Mr Williamson emphasised, there was no evidence of any clear motive for the appellant to burn down his house; he was in a sound financial position. Even so, it is impossible to understand Mr Williamson's optimism when all three prosecution expert witnesses unequivocally and confidently gave evidence that the fire was caused by the ignition of litres of petrol in the lounge room. As the appellant (through Mr Williamson) admitted at trial, he was the only person in the house when the fire started, the prosecution case against him was compelling unless he called other expert evidence to gainsay the opinions of the prosecution expert witnesses. So much is clear from the judge's summation for the jury of the defence case.[8]

[52] On Mr Williamson's and Mr Bartel's accounts, they advised the appellant that he could obtain an expert forensic report for between $2,000 and $5,000 and the appellant instructed them that he did not wish to do this because of the expense. It is clear even on their accounts, that the appellant made that decision on the basis of Mr Williamson's advice that he was likely to be acquitted without his own favourable expert report. Mr Williamson gave evidence that he considered obtaining a report might in some way damage the appellant's case. It is difficult to apprehend his concern. The defence was not required to disclose any such report to the prosecution if it was unfavourable. Even accepting that the appellant gave instructions not to seek an expert report, he made that decision based on legal advice which no competent lawyer could have given.

[53] The further evidence provided to this Court in the form of Mr Cafe's report together with the appellant's evidence makes the following matters clear. Had his lawyers advised him to obtain an expert report and to call an expert witness at trial, he would have done so. A report could have been obtained from Mr Cafe which favoured his case and contradicted the opinions of the prosecution expert witnesses and Mr Cafe would have given evidence at his trial.

[54] The question for an appellate court in determining whether a miscarriage of justice has occurred by reason of the incompetence of those who represent an accused person at trial is whether, viewed objectively, there could be a reasonable explanation for the conduct the subject of complaint. Appellate courts are reluctant to intervene on this basis: *R v Birks*.[9] If there could be such an explanation, no miscarriage is shown to have occurred: *TKWJ v The Queen*;[10] *R v Sheppard*.[11]

[55] Despite the apparent lack of motive for the appellant to burn down his house and make a false claim against his insurer, the prosecution case against him was compelling, solely because of the strong prosecution expert evidence that the fire was caused by the ignition of litres of petrol in the lounge room. It is impossible to understand how Mr Williamson could have considered the appellant had good prospects of defending that case in the absence of a plausible attack on the prosecution expert evidence. The appellant gave clear and unequivocal instructions to his lawyers that he did not light the fire. He was an educated man of means.

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8 See [24] of these reasons.

9 (1990) 19 NSWLR 677, 684-5.

10 (2002) 212 CLR 124, Gleeson CJ, [16]; Gaudron J, [31]-[33], McHugh J, [79], Hayne J, [107]-[108]; [2002] HCA 46.

11 [2005] QCA 235, [33]-[34].

According to Mr Williamson and Mr Bartels, he baulked at the cost of obtaining a forensic expert report. But he did so in the context of receiving legal advice that his prospects of defending the case were excellent without it when, in truth, they were very poor. Any decision not to get an expert report in those circumstances was not an informed decision made on the basis of competent legal advice. The further evidence placed before this Court shows that there is expert forensic evidence to gainsay the prosecution expert evidence. I consider that there is a significant possibility (or a likelihood) that if Mr Cafe's evidence was before a properly instructed jury, they may have had a reasonable doubt about the appellant's guilt on both counts. It follows that there has been a miscarriage of justice arising from the incompetent conduct of the appellant's legal representatives.

[56] That is not to say that a properly instructed jury will find the appellant not guilty. But the miscarriage of justice is that the appellant has been deprived unfairly of the chance of an acquittal by his incompetent legal representation at trial.

[57] For these reasons, I joined in the orders of this Court on 29 November 2011 allowing the appeal against conviction, setting aside the convictions, and ordering a new trial.

[58] It is not necessary to determine the remaining grounds of appeal but there are some observations I wish to make about them.

Observations as to the ground of appeal concerning the psychic juror

[59] From the italicised passage in the speaker's account to the trial judge set out at [20] of these reasons, there was a possibility that juror number 11 spoke to jury members other than the speaker about her psychic powers, perhaps even about what she "saw" as to how this fire started. In those circumstances, it would have been prudent for his Honour to have had all remaining jurors brought into the courtroom to enquire whether any of them had spoken to juror number 11 about her psychic powers. If any member gave an affirmative response, that jury member should have been questioned in open court in the absence of the remaining jury members, about that conversation and whether it was communicated to other jury members. If at the end of that inquiry the judge was satisfied the trial could continue with the remaining 11 jurors, he should have reminded them of their responsibility to decide the case only on the evidence at trial and not to take into account anything apart from that evidence.

Observations about the judge's directions to the jury as to the appellant's alleged lie

[60] Whether in any retrial there is sufficient evidence that the appellant lied out of a consciousness of guilt requiring a direction of the kind given in this case[12] consistent with *Edwards v The Queen*[13] will depend on the evidence at the retrial. It seems likely that the issue at any retrial will be whether there is a reasonable doubt about the prosecution expert evidence as to the seat and cause of the fire and whether it is reasonably possible that the fire may have started in the way Mr Cafe opines. Mr Cafe's evidence presently seems generally consistent with the appellant's account to investigators. If that is the evidence in the retrial, it would be wrong for the prosecution to suggest the appellant's account was a lie demonstrating

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12 Set out at [22] of these reasons.

13 (1993) 178 CLR 193; [1993] HCA 63.

consciousness of guilt. Rather, a direction to the jury consistent with *Zoneff v The Queen*[14] would be warranted.

[61] **FRASER JA:** I agree with the reasons for judgment of the President for the orders made on 29 November 2011.

[62] **MARGARET WILSON AJA:** I agree with the reasons of the President for the orders made on 29 November 2011.

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14 (2000) 200 CLR 234, 245, [23]; [2000] HCA 28.